

***United States Court of Appeals
for the Second Circuit***



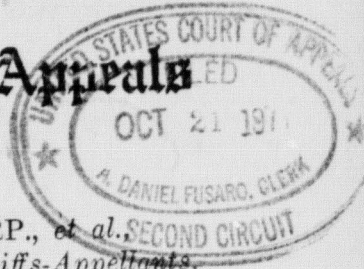
**APPELLEE'S
SUPPLEMENTAL
BRIEF**

To be argued by
LEWIS A. KAPLAN

10/21
77-7037

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P/S

United States Court of Appeals
For the Second Circuit



NATIONAL AUTO BROKERS CORP., *et al.*,
Plaintiffs-Appellants,
and

COURTESY AUTO BROKERS, *et ano.*,
Plaintiffs,
against

GENERAL MOTORS CORPORATION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

**SUPPLEMENTAL BRIEF OF APPELLEES
FREDERIC G. DONNER AND JAMES M. ROCHE**

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Cases:

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Frederic G. Donner and James M. Roche are both former chairmen of the board of directors of General Motors Corporation ("GM") and were sued individually below. They join in the brief submitted on behalf of GM and General Motors Acceptance Corporation. This supplemental brief is submitted to emphasize the fact that the trial court properly dismissed as to Messrs. Donner and Roche.

Preliminary Statement

We will show that Messrs. Donner and Roche had substantially nothing to do with Nabcor. Plaintiffs' brief seeks to create a contrary impression, but it does so only by gross distortions of the record. We cite two examples:

1. Plaintiffs suggest by creative use of a run-on sentence that Messrs. Donner and Roche were aware that Nabcor bought a car from Colonial Cadillac in May 1966:

"Title went from Colonial, to Colonial's Mercer Leasing subsidiary (the first retail purchaser), and then to Nabcor (E-27-8; NIA-1898), making Nabcor the second retail purchaser and Nabcor's customer the third retail purchaser, according to Donner and Roche (A-4404, 4429)." (Pl. br. 15-16) (Emphasis added)

There is no evidence that either Mr. Donner or Mr. Roche had any knowledge of any of Nabcor's transactions with Colonial Cadillac. At the first of the two record references cited (A4404), Mr. Roche testified that in some time periods, a person who purchased a car from someone who in turn had purchased the car from a GM dealer would have been considered a "second owner" for purposes of determining warranty coverage. At the second record reference cited (A4429), Mr. Donner testified that a reseller of automobiles who purchased a car from a GM dealer would be in the same position as any other purchaser vis-a-vis warranty coverage.

2. Plaintiffs state that Mr. Roche found a Nabcor advertisement significant because he did not believe anyone other than GM had the right to sell *franchises to sell GM cars*. (Pl. br. 17) Thus, they imply that Mr. Roche was

suggesting that no one had the right to sell franchises to automobile brokers or discounters like Nabcor. But Mr. Roche actually testified that he thought the advertisement was significant because "it was offering to sell *General Motors franchises . . .*" (A4402) (Emphasis added)

ARGUMENT

There Was No Evidence that Messrs. Donner or Roche Participated in Any Antitrust Violation

The trial court concluded that the plaintiffs in this case failed to offer evidence from which the jury could have concluded (a) that there was any violation of the antitrust laws by any of the defendants, (b) that plaintiffs were injured by any such violation, or (c) that damages could have been awarded to plaintiffs on any rational basis. Messrs. Donner and Roche submit that the trial court was correct and that the judgment below should therefore be affirmed. Nevertheless, even if this Court were to conclude that the trial court erred on all three of those points, the judgment dismissing the complaint as to Messrs. Donner and Roche nevertheless should be affirmed. The trial court correctly directed a verdict in their favor for reasons independent of the balance of the case. (A5783-91)

The sole relationship of Messrs. Donner and Roche to this case stems from an ad Nabcor ran in *The New York Times* in June 1966, more than 11 years ago. Someone on the GM staff forwarded to the offices of Messrs. Donner and Roche a memorandum which reprinted the ad. (E33) The memorandum reported that Nabcor had told someone who had responded to the ad that Nabcor "distributes cars for General Motors . . ." (*Ibid.*)

The evidence, viewed most favorably to the plaintiffs, is that Mr. Donner saw the memorandum and sent it to Mr. Roche because it related to distribution, which was under Mr. Roche's jurisdiction. (A4426-27) That is Mr. Donner's total involvement in this case. He never followed up on the memorandum, if indeed he ever saw it, and he never spoke to Mr. Roche about it. (A4427-28)

Mr. Roche received the memorandum on or about June 9, 1966. (E33; A4400-01) He testified that the memorandum "probably awakened [his] curiosity" because the Nabcor advertisement "was offering to sell GM franchises". (A4402)

Mr. Roche, or someone in his office, sent the memorandum to GM's vice president in charge of distribution. (A4400-01) The distribution staff made a brief inquiry, and two or three memoranda describing Nabcor were prepared in June 1966. (E31; E83-85; E9) The information thus gathered was sent to Mr. Roche's office on July 1, 1966. (E30) There is no evidence that Mr. Roche took any other action whatsoever with respect to Nabcor.

Thus, the sum total of the evidence against Messrs. Donner and Roche is that Mr. Donner may have sent a copy of a Nabcor ad to Mr. Roche, and Mr. Roche asked his staff to find out what Nabcor was.¹ Indeed, plaintiffs conceded below that the documents they rely upon are meaningless:

1. Plaintiffs have abandoned several even more spurious theories initially asserted below. (See R788, R790, R793, R794) And while plaintiffs imply that Mr. Roche was involved in Nabcor's 1967 effort to obtain a fleet certificate by virtue of the fact that Frank Maiorana spoke to someone on Mr. Roche's staff, Edward Belcher (pl. br. 42), the undisputed evidence was that Mr. Roche never discussed the matter with Mr. Belcher. (A4419)

"[The Court:] . . . What documents—any my memory of those documents is there was nothing except routine notice to corporate officials about potential competition, and if a corporate official doesn't notice his potential competition he is not doing his job.

"Mr. Person: That is correct. These were investigations of Nabcor and concerning Nabcor and I mean—

"The Court: They did not in and of themselves indicate to Mr. Roche or Mr. Donner that somebody was out conspiring against Nabcor or doing something wrong against Nabcor, did they?

"Mr. Person: No." (A5788-89)

Thus, there is no evidence whatsoever that either Mr. Donner or Mr. Roche ever interfered with Nabcor's business in any way or, for that matter, did anything other than make an inquiry about a company which was purporting to sell GM franchises.

This Court has squarely held that a corporate director, "merely by reason of his office, is not personally liable for the torts of his corporation." In order to be liable individually for antitrust or other violations, a director "must be shown to have personally voted for or otherwise participated in them."² The same rule applies to corporate officers.³ Here there was no showing whatsoever that either Mr. Donner or Mr. Roche "personally voted or otherwise participated in" any violation of the anti-

2. *Phelps Dodge Refining Corp. v. FTC*, 139 F.2d 393, 397 (2d Cir. 1943).

3. *E.g., Coro, Inc. v. FTC*, 338 F.2d 149, 154 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1271 (S.D.N.Y. 1976).

trust laws. Hence, the judgment dismissing the complaint as to them must be affirmed.

There is an independent reason for affirmance as to Messrs. Donner and Roche. The most recent connection that either was shown to have had with Nabcor was a memorandum reporting on Nabcor sent to Mr. Roche on July 1, 1966. (E30) There was no evidence that either even heard of Nabcor again after that date.⁴ Since this action was commenced on December 10, 1970 (A3), more than four years later, any claims against Messrs. Donner and Roche are barred by the statute of limitations.⁵

Conclusion

For the foregoing reasons, the judgment dismissing the complaint as against Messrs. Donner and Roche should be affirmed irrespective of the disposition of this case as to any other parties.

Dated: October 24, 1977

Respectfully submitted,

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4. Frank Maiorana did write a letter to GM in February 1968 complaining about Nabcor's failure to receive a fleet certificate. A copy was sent to and received in Mr. Roche's office (E67), but there was no evidence that it came to Mr. Roche's personal attention. Mr. Donner had retired by that date. (A5786; A1624)

5. 15 U.S.C. §15b provides in pertinent part: "Any action to enforce any cause of action under [the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued."

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

NAN C. MASTERS, being sworn, says:

1. I am not a party to this action, am over the age of 18 years, and reside at 340 East 80th Street, New York, New York 10021.

2. On October 21, 1977, I served two copies of the foregoing Supplemental Brief of Appellees Donner and Roche upon the following attorneys at the addresses designated by them for that purpose:

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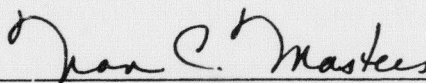
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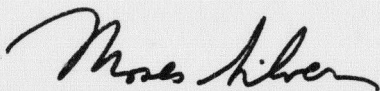
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3. Said service was made by depositing true copies thereof, enclosed in postpaid properly addressed wrappers, in an official depository under the care and custody of the United States Postal Service within the State of New York.


Nan C. Masters

Sworn to before me this
2nd day of October 1977



MOSES SILVERMAN
Notary Public, State of New York
No. 4519455
Qualified in New York County
Commission Expires March 30, 1978



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